

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

AMO DEVELOPMENT, LLC, )  
AMO MANUFACTURING USA, LLC, )  
and AMO SALES AND SERVICE, )  
INC., )

Plaintiffs, )

v. )

ALCON VISION, LLC, ALCON )  
LABORATORIES, INC., and ALCON )  
RESEARCH, LLC, )

Defendants. )

---

ALCON, INC., ALCON RESEARCH, )  
LLC and ALCON VISION, LLC, )

Counterclaim Plaintiffs, )

v. )

AMO DEVELOPMENT, LLC, )  
AMO MANUFACTURING USA, LLC, )  
AMO SALES AND SERVICE, INC. )  
and JOHNSON & JOHNSON )  
SURGICAL VISION, INC., )

Counterclaim Defendants. )

**REDACTED - PUBLIC VERSION**

C.A. No. 20-842-CFC-JLH



**ALCON'S BRIEF IN SUPPORT OF ITS MOTION  
TO EXCLUDE CERTAIN EXPERT TESTIMONY  
(NO. 1) OF DR. KATHRYN HATCH, M.D.**

OF COUNSEL:

Jeanne M. Heffernan  
Kirkland & Ellis llp  
401 Congress Avenue  
Austin, TX 78701  
(512) 678-9123

Gregg F. LoCascio  
Sean M. McEldowney  
Noah S. Frank  
Kelly Tripathi  
Kirkland & Ellis llp  
1301 Pennsylvania Avenue, NW  
Washington, DC 20004  
(202) 389-5000

Joshua L. Simmons  
Kirkland & Ellis llp  
601 Lexington Ave  
New York, NY 10022  
(212) 390-4573

Caroline Lourgors  
Kirkland & Ellis llp  
300 North LaSalle  
Chicago, IL 60654  
(312) 862-2000

Kristen P.L. Reichenbach  
Kirkland & Ellis llp  
555 California Street  
San Francisco, CA 94104  
(415) 439-1400

Dated: August 19, 2022

John W. Shaw (No. 3362)  
Karen E. Keller (No. 4489)  
Andrew E. Russell (No. 5382)  
Nathan R. Hoeschen (No. 6232)  
Shaw Keller llp  
I.M. Pei Building  
1105 North Market Street, 12th Floor  
Wilmington, DE 19801  
(302) 298-0700  
jshaw@shawkeller.com  
kkeller@shawkeller.com  
arussell@shawkeller.com  
nhoeschen@shawkeller.com  
*Attorneys for Alcon Inc.,  
Alcon Vision, LLC,  
Alcon Laboratories, Inc. and  
Alcon Research, LLC*

## **TABLE OF CONTENTS**

	<b>Page(s)</b>
I. Nature and Stage of the Proceedings.....	1
II. Summary of Argument .....	2
III. Statement of Facts.....	2
IV. Legal Standards .....	4
V. Argument .....	5
A. Dr. Hatch’s opinion [REDACTED] should be excluded as unqualified and unreliable .....	5
1. Dr. Hatch is unqualified to offer such an opinion .....	5
2. Dr. Hatch provides no reliable support for such an opinion .....	6
B. Dr. Hatch provides no reliable methodology to support her opinions on what decision-makers consider and what other physicians prefer in FLACS devices.....	9
VI. Conclusion .....	10

## **TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>360Heros, Inc., v. GoPro, Inc.</i> , No. 17-cv-1302-MFK-CJB (D. Del. Mar. 30, 2022).....	9
<i>Calhoun v. Yamaha Motor Corp.</i> , 350 F.3d 316 (3d Cir. 2003) .....	4
<i>Daubert v. Merrell Dow Pharms., Inc.</i> , 509 U.S. 579 (1993).....	4
<i>Diaz v. Jonson Matthey, Inc.</i> , 893 F. Supp. 358 (D.N.J. 1995).....	6
<i>Ferris v. Pa. Fed’n Bhd.</i> , 153 F. Supp. 2d 736 (E.D. Pa. 2001).....	6
<i>Gen. Elec. Co. v. Joiner</i> , 522 U.S. 136 (1997).....	5, 6
<i>Mahmood v. Narciso</i> , 549 F. App’x 99 (3d Cir. 2013) .....	4, 8
<i>Meadows v. Anchor Longwall</i> , 306 F. App’x 781 (3d Cir. 2009) .....	7
<i>In re Paoli R.R. Yard PCB Litig.</i> , 35 F.3d 717 (3d Cir. 1994) .....	8
<i>Reger v. A.I. duPont Hosp.</i> , 259 F. App’x 499 (3d Cir. 2008) .....	7
<i>Waldorf v. Shuta</i> , 142 F.3d 601 (3d Cir. 1998) .....	5

## **Rules**

Federal Rule of Evidence 702.....	4
-----------------------------------	---

\* All emphasis added, and citations and marks omitted, unless otherwise indicated.

## I. NATURE AND STAGE OF THE PROCEEDINGS

J&J<sup>1</sup> asserts that the accused LenSx device competes with J&J's Catalys device. D.I. 141 ¶¶1, 78. Both products are femtosecond laser-assisted cataract surgery ("FLACS") devices that may be used to remove a clouded lens of the eye, which is then replaced with an artificial intraocular lens ("IOL"). [REDACTED]

[REDACTED] for a given procedure, one manufacturer's IOL can be, and often is, used in a procedure performed with another manufacturer's FLACS device. [REDACTED]

[REDACTED] Nonetheless, J&J's ophthalmic expert, Kathryn Hatch, M.D., offers opinions about [REDACTED]

[REDACTED]

[REDACTED] She further opines about what [REDACTED]

[REDACTED] and what [REDACTED]

[REDACTED]

Dr. Hatch's opinions suffer from two fatal flaws. *First*, Dr. Hatch is not qualified to provide these opinions because they do not concern the practice of medicine, but rather provider administration. She is not a healthcare administrator,

[REDACTED] She has neither negotiated [REDACTED] to purchase a [REDACTED] nor even seen such a [REDACTED]

---

<sup>1</sup> "J&J" collectively refers to AMO Development, LLC, AMO Manufacturing USA, LLC, and AMO Sales and Service, Inc.

Nonetheless, she assumes that discounts on [REDACTED] are included in [REDACTED]  
[REDACTED] *Second*, Dr. Hatch's  
opinions are not based on any reliable methodology, [REDACTED]  
[REDACTED] Dr. Hatch then extrapolates from her beliefs to what other doctors prefer,  
[REDACTED]  
[REDACTED] And although Dr. Hatch alleges that her opinions are formed by  
[REDACTED] she could not name [REDACTED] that  
informed her opinions. Because Dr. Hatch's opinions lack an appropriate basis and  
are outside her expertise, they should be excluded.

## **II. SUMMARY OF ARGUMENT**

*First*, Dr. Hatch's expertise as an ophthalmologist does not qualify her to  
opine [REDACTED], and her opinions on  
[REDACTED] are unreliable, and are also unsupported.

*Second*, Dr. Hatch is not qualified to opine on what other people think,  
consider, or prefer; and her opinions on what other people think, consider, or prefer  
are not helpful to the jury and are unreliable.

## **III. STATEMENT OF FACTS**

Kathryn Hatch, J&J's ophthalmic expert, submitted two expert reports in this  
Action. A1701–50, Hatch Op. Rpt.; A1752–74, Hatch Rpl. Rpt. Two of Dr. Hatch's  
opinions are germane to this motion.

First, Dr. Hatch opines on the purported [REDACTED]

[REDACTED] She concludes [REDACTED]

[REDACTED] stating that a hospital or ASC

[REDACTED]. A1732–33, Hatch Op. Rpt. ¶¶80-81; A1752–74, Hatch Rpl. Rpt.

¶¶12-16, 39-45. This opinion is based solely on Dr. Hatch's [REDACTED]

[REDACTED] which she purportedly gained [REDACTED]

[REDACTED] But Dr. Hatch could not [REDACTED]

[REDACTED] Indeed, she cites [REDACTED] in support and admits she [REDACTED]

Second, Dr. Hatch opines as to what other people consider or prefer, including what [REDACTED]

[REDACTED] She offers no [REDACTED] for these opinions. Instead, they merely

reflect what she “ [REDACTED]

[REDACTED] Likewise, although Dr. Hatch offers opinions on [REDACTED]

Dr. Hatch further opines that [REDACTED]

[REDACTED] She

appears to base this opinion on the fact that she, personally, is “ [REDACTED]

[REDACTED] Indeed, she was clear that she is *not* speaking [REDACTED]

and [REDACTED] to determine whether her supposition was correct.

#### IV. LEGAL STANDARDS

Under Federal Rule of Evidence 702, the party offering an expert must prove that the expert meets the “trilogy of restrictions on expert testimony: qualification, reliability and fit.” *Calhoun v. Yamaha Motor Corp.*, 350 F.3d 316, 321 (3d Cir. 2003); Fed. R. Evid. 702; *see also Mahmood v. Narciso*, 549 F. App’x 99, 102 (3d Cir. 2013). Testimony failing any part of this trilogy must be excluded. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).



## V. ARGUMENT

This is the quintessential case where this Court should exercise its gatekeeping function to exclude Dr. Hatch's unqualified testimony that rests on nothing other than her *ipse dixit*. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Dr. Hatch's opinions that FLACS and IOL sales are linked and that decision-makers and physicians consider or prefer certain features in a FLACS device should be excluded as unqualified and unreliable.

### A. Dr. Hatch's opinion [REDACTED] [REDACTED] should be excluded as unqualified and unreliable

#### 1. *Dr. Hatch is unqualified to offer such an opinion*

Dr. Hatch's opinion that there are [REDACTED]

[REDACTED] should be struck because it falls outside her area of expertise as a clinical ophthalmologist. [REDACTED]

[REDACTED] *see Waldorf v. Shuta*, 142 F.3d 601, 625 (3d Cir. 1998) (explaining that a proffered expert lacking "specialized knowledge regarding the areas of testimony" fails the qualification requirement). Dr. Hatch provides [REDACTED] for this opinion,

[REDACTED] instead relying on her

But Dr. Hatch is a clinician, [REDACTED] not an administrator. [REDACTED]

[REDACTED] She does not [REDACTED]

[REDACTED]

[REDACTED] Indeed, Dr. Hatch considers

[REDACTED] [REDACTED]

She has never acquired a [REDACTED]

[REDACTED] She has never even [REDACTED]

[REDACTED]

[REDACTED] Indeed, her own admission that she [REDACTED]

[REDACTED] makes clear

that these [REDACTED] are outside her expertise. Dr. Hatch is therefore

unqualified to provide such testimony. *See Gen. Elec.*, 522 U.S. at 146; *see also*,

*Ferris v. Pa. Fed'n Brotherhood of Maintenance of Way Emp.*, 153 F. Supp. 2d 736,

743-44 (E.D. Pa. 2001) (pathologist unqualified to opine on cause of depression and

anxiety); *Diaz v. Johnson Matthey, Inc.*, 893 F. Supp. 358, 372-73 (D.N.J. 1995)

(pulmonologist unqualified to opine on cause of platinum allergy).

2. *Dr. Hatch provides no reliable support for such an opinion*

Lacking any personal experience [REDACTED]

[REDACTED] Dr. Hatch relies on [REDACTED] to form

her opinion that [REDACTED]

[REDACTED] But when asked

about the basis for her opinions that [REDACTED]

[REDACTED], Dr. Hatch cited [REDACTED], not her own. [REDACTED] She further conceded that [REDACTED]

[REDACTED]  
[REDACTED]  
Those same [REDACTED]

[REDACTED] Dr. Hatch is neither a [REDACTED] A1806, *id.* at 121:18-24. Moreover, Dr. Hatch could not point to a single [REDACTED] that informed her opinion, and even [REDACTED], instead justifying her opinion regarding the relationship between [REDACTED] and [REDACTED] on the assertion that [REDACTED]

[REDACTED] That is not how experts form reliable opinions. *See, e.g., Reger v. A.I. duPont Hosp.*, 259 F. App'x 499, 500 (3d Cir. 2008) (“Quite simply, [Dr.] Hannan’s *ipse dixit* does not meet Rule 702’s reliability requirement” because “his opinion . . . was not supported by citation or reference to any scientific data or texts” but rather “his subjective belief.”); *Meadows v. Anchor Longwall*, 306 F. App'x 781, 790 (3d Cir. 2009) (“[T]he analytical gap between the data and the opinion proffered is too great and is connected only by the *ipse dixit* of the expert, not by any evidence”).

In the final paragraph of her reply report, Dr. Hatch attempts to salvage her speculation—with more speculation. Dr. Hatch claims she [REDACTED]

[REDACTED] Notably, Dr. Hatch never saw the [REDACTED] that purportedly included [REDACTED] along with the purchase [REDACTED]

[REDACTED] Nonetheless, she speculates that the [REDACTED] Yet, when pressed on the basis for her opinion regarding [REDACTED] Dr. Hatch admitted [REDACTED]

[REDACTED] Dr. Hatch's speculation [REDACTED] is ripe for exclusion.

Accordingly, this Court should exclude as unreliable Dr. Hatch's opinions that [REDACTED]. *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (3d Cir. 1994) (explaining an expert's testimony is unreliable where based on "subjective belief or unsupported speculation" as opposed to "methods and procedures of science"); *Mahmood*, 549 F. App'x at 103 (affirming exclusion of testimony that "scarcely contained analysis").

**B. Dr. Hatch provides no reliable methodology to support her opinions on [REDACTED]**

Dr. Hatch's opinions regarding [REDACTED]

[REDACTED] should also be excluded as unreliable. Dr. Hatch opines on what *other people* consider, prefer, or think. [REDACTED]

[REDACTED] But as Dr. Hatch admitted, she speaks [REDACTED] and [REDACTED] nor [REDACTED]

[REDACTED] Indeed, courts hold that to offer such opinions, an expert "would surely have been required to have surveyed the viewpoints of a broad array of stakeholders . . . so that [she] could speak with authority on those stakeholders' wants and needs." *See 360Heros, Inc., v. GoPro, Inc.*, No. 17-cv-1302-MFK-CJB, D.I. 301, at 53 (slip op.) (D. Del. Mar. 30, 2022) (excluding testimony as impermissible lay testimony). But Dr. Hatch [REDACTED] A1782, Hatch Tr. 23:11-18. Therefore, she cannot opine on others' preferences.

## VI. CONCLUSION

Because Dr. Hatch is a clinical ophthalmologist opining without support on subjects outside of her clinical expertise, Alcon respectfully requests exclusion of her testimony to that effect.

Respectfully submitted,

/s/ Andrew E. Russell

John W. Shaw (No. 3362)

Karen E. Keller (No. 4489)

Andrew E. Russell (No. 5382)

Nathan R. Hoeschen (No. 6232)

SHAW KELLER LLP

I.M. Pei Building

1105 North Market Street, 12th Floor

Wilmington, DE 19801

(302) 298-0700

jshaw@shawkeller.com

kkeller@shawkeller.com

arussell@shawkeller.com

nhoeschen@shawkeller.com

*Attorneys for Alcon Inc.,*

*Alcon Vision, LLC,*

*Alcon Laboratories, Inc. and*

*Alcon Research, LLC*

### OF COUNSEL:

Jeanne M. Heffernan

KIRKLAND & ELLIS LLP

401 Congress Avenue

Austin, TX 78701

(512) 678-9123

Gregg F. LoCascio

Sean M. McEldowney

Noah S. Frank

Kelly Tripathi

KIRKLAND & ELLIS LLP

1301 Pennsylvania Avenue, NW

Washington, DC 20004

(202) 389-5000

Joshua L. Simmons

KIRKLAND & ELLIS LLP

601 Lexington Ave

New York, NY 10022

(212) 390-4573

Caroline Lourgou

KIRKLAND & ELLIS LLP

300 North LaSalle

Chicago, IL 60654

(312) 862-2000

Kristen P.L. Reichenbach  
KIRKLAND & ELLIS LLP  
555 California Street  
San Francisco, CA 94104  
(415) 439-1400

Dated: August 19, 2022

**WORD COUNT CERTIFICATION**

The undersigned counsel hereby certifies that Alcon's Brief in Support of Its Motion to Exclude Certain Expert Testimony (No. 1) of Dr. Kathryn Hatch, M.D. contains 2,180 words excluding the cover page, tables and signature blocks, as counted by Microsoft Word, in 14-point Times New Roman font. Alcon's case dispositive motions and *Daubert* motions combined contain 12,500 words or less.

/s/ Andrew E. Russell

John W. Shaw (No. 3362)

Karen E. Keller (No. 4489)

Andrew E. Russell (No. 5382)

Nathan R. Hoeschen (No. 6232)

SHAW KELLER LLP

I.M. Pei Building

1105 North Market Street, 12th Floor

Wilmington, DE 19801

(302) 298-0700

jshaw@shawkeller.com

kkeller@shawkeller.com

arussell@shawkeller.com

nhoeschen@shawkeller.com

*Attorneys for Alcon Inc.,*

*Alcon Vision, LLC,*

*Alcon Laboratories, Inc. and*

*Alcon Research, LLC*



**CERTIFICATE OF SERVICE**

I, Andrew E. Russell, hereby certify that on August 19, 2022, this document was served on the persons listed below in the manner indicated:

**BY EMAIL**

Jack B. Blumenfeld  
Brian P. Egan  
MORRIS, NICHOLS, ARSHT  
& TUNNELL LLP  
1201 North Market Street  
P.O. Box 1347  
Wilmington, DE 19899  
(302) 658-9200  
jblumenfeld@mnat.com  
began@mnat.com

Roger J. Chin  
Allison Harms  
Joseph R. Wetzel  
LATHAM & WATKINS LLP  
505 Montgomery Street, Suite 2000  
San Francisco, CA 94111  
(415) 491-0600  
roger.chin@lw.com  
allison.harms@lw.com  
joe.wetzel@lw.com

P. Anthony Sammi  
Rachel Renee Blitzer  
LATHAM & WATKINS LLP  
1271 Avenue of the Americas  
New York, NY 10020  
(212) 906-1200  
tony.sammi@lw.com

Michael A. Morin  
Matthew J. Moore  
Rachel Weiner Cohen  
Sarang V. Damle  
Holly K. Victorson  
Carolyn M. Homer  
Susan Y. Tull  
LATHAM & WATKINS LLP  
555 Eleventh Street, NW, Suite 1000  
Washington, DC 20004  
(202) 637-2200  
michael.morin@lw.com  
matthew.moore@lw.com  
rachel.cohen@lw.com  
sy.damle@lw.com  
holly.victorson@lw.com  
carolyn.homer@lw.com  
susan.tull@lw.com

S.Giri Pathmanaban  
LATHAM & WATKINS LLP  
140 Scott Drive  
Menlo Park, CA 94025  
(650) 328-4600  
giri.pathmanaban@lw.com

Aaron Macris  
LATHAM & WATKINS LLP  
200 Clarendon Street  
Boston, MA 02116  
(617) 948-6000  
aaron.macris@lw.com

/s/ Andrew E. Russell

John W. Shaw (No. 3362)

Karen E. Keller (No. 4489)

Andrew E. Russell (No. 5382)

Nathan R. Hoeschen (No. 6232)

SHAW KELLER LLP

I.M. Pei Building

1105 North Market Street, 12th Floor

Wilmington, DE 19801

(302) 298-0700

jshaw@shawkeller.com

kkeller@shawkeller.com

arussell@shawkeller.com

nhoeschen@shawkeller.com

*Attorneys for Defendants*